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IN THE

United States Court of Appeals

FOR THE FOURTH CIRCUIT

No. 7448

AROLD H. RIPPERGER,

Appellant.

v.

UNITED STATES OF AMERICA,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND (ROSZEL C. THOMSEN, Chief Judge)

BRIEF AND APPENDIX FOR APPELLANT

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The Daily Record Co., Baltimore 1, Md.

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BRIEF FOR APPELLANT

STATEMENT OF THE CASE

This is an appeal from the verdict of guilty against Arold H. Ripperger under both counts of a two count Information, charging Defendant with willful failure to file income tax return for the calendar year 1953, in violation of Section 145(a), Internal Revenue Code of 1939; and with willful failure to file income tax return for the calendar year 1954 in violation of Section 7203, Internal Revenue Code of 1954. The criminal acts charged in the Information were the receipt by defendant in 1953 of a gross income in the amount of $7,523.69, and the receipt by the defendant in 1954 of a gross income in the amount of $8,051.96, and his willful failure to file income tax returns for said years. No specific act of willfulness, fraudulent conduct, tax eva-

sion, evil intent, or bad motive was proved by the government, nor were acts disclosing such bad purposes even mentioned in the brief testimony of the government's witnesses, unless the mere failure to file returns is in itself, with nothing more, considered as "evidence" sufficient to prove willfulness.

In commenting upon the facts in the case which showed "that it is not one of the more serious cases," the Court noted "that this is not a case where the failure to file was because of any improper activity on the side or because the person was accumulating money and was trying to hide it away" (App. 37).

Defendant pleaded "Not Guilty" and waived trial by jury, whereupon the case was tried before the Court.

Defendant was convicted under both counts of the Information and sentenced to three months on each of the 1st and 2d counts of the Criminal Information, said terms of imprisonment to run concurrently.

QUESTIONS INVOLVED

I.

In rewriting the Internal Revenue Code which culminated in the Internal Revenue Code of 1954, Congress brought together in Chapter 75 thereof all criminal offenses which had theretofore been scattered throughout many chapters and sections of the tax laws.

In commenting upon this phase of the Internal Revenue Code revision, the Senate Finance Committee Report states as follows:

> "In this Chapter all criminal offenses are brought together, as are all other offenses. . . .
>
> "In general, uniform penalties are provided by the House bill instead of the varying penalties now provided for *what in substance is the same offense, namely, the attempt to evade tax.* . . ." (Italics supplied) (Re-

port of the Committee on Finance United States Senate, 83rd Congress, Second Session, Report No. 1622, page 147.)

QUESTION: Since the government did not meet its burden of proving an affirmative willful attempt to evade tax on the part of defendant, did the District Court err in finding defendant guilty of willful failure to file tax returns for the years 1953 and 1954?

II.

Where a statute denounces as criminal a willful failure to perform a duty to the government, the government, in prosecuting a defendant under such statute, should affirmatively offer specific proof of an evil intent or bad purpose in order to prove willfulness on the part of the defendant in connection with his failure to perform such duty.

QUESTION: Did the District Court err in finding defendant guilty of willful failure to file tax returns for the years 1953 and 1954 in the absence of specific proof of an evil intent or bad purpose on the part of defendant in connection with his failure to file such returns?

III.

Did the District Court err in not granting defendant's request for a directed verdict?

STATUTES INVOLVED

Sec. 145(a) (1939 Internal Revenue Code):

"Failure to file returns, submit information, or pay estimated tax or tax. Any person required under this chapter to pay any estimated tax or tax, or required by law or regulations made under authority thereof to make a return or declaration, keep any records, or supply any information, for the purposes of the computation, assessment, or collection of any estimated tax or tax imposed by this chapter, who willfully fails to pay such estimated tax or tax, make such return or declaration, keep such records, or supply such in-

formation, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than one year, or both, together with the cost of prosecution."

Sec. 145(b) (1939 Internal Revenue Code):

"Failure to collect and pay over tax, or attempt to defeat or evade tax. Any person required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution."

Sec. 3401(e):

"NUMBER OF WITHHOLDING EXEMPTIONS CLAIMED. — For purposes of this chapter, the term 'number of withholding exemptions claimed' means the number of withholding exemptions claimed in a withholding exemption certificate in effect under section 3402(f), or in effect under the corresponding section of prior law, except that if no such certificate is in effect, the number of withholding exemptions claimed shall be considered to be zero."

Sec. 3402(a) INCOME TAX COLLECTED AT SOURCE:

"REQUIREMENT OF WITHHOLDING. — Every employer making payment of wages shall deduct and withhold upon such wages (except as provided in subsection (j)) a tax equal to 18 percent of the amount by which the wages exceed the number of withholding exemptions claimed, multiplied by the amount of one such exemption as shown in subsection (b)(1)."

Sec. 3402(f):

"WITHHOLDING EXEMPTIONS.—

"(1) IN GENERAL — An employee receiving wages shall on any day be entitled to the following withholding exemptions:

"(A) an exemption for himself;

"(B) one additional exemption for himself if, on the basis of facts existing at the beginning of such day, there may reasonably be expected to be allowable an exemption under section 151(c)(1) (relating to old age) for the taxable year under subtitle A in respect of which amounts deducted and withheld under this chapter in the calendar year in which such day falls are allowed as a credit;

"(C) one additional exemption for himself if, on the basis of facts existing at the beginning of such day, there may reasonably be expected to be allowable an exemption under section 151(d)(1) (relating to the blind) for the taxable year under subtitle A in respect of which amounts deducted and withheld under this chapter in the calendar year in which such day falls are allowed as a credit;

"(D) if the employee is married, any exemption to which his spouse is entitled, or would be entitled if such spouse were an employee receiving wages, under subparagraph (A), (B), or (C), but only if such spouse does not have in effect a withholding exemption certificate claiming such exemption; and

"(E) an exemption for each individual with respect to whom, on the basis of facts existing at the beginning of such day, there may reasonably be expected to be allowable an exemption under section 151(e) for the taxable year under subtitle A in respect of which amounts deducted and withheld under this chapter in the calendar year in which such day falls are allowed as a credit."

Sec. 3403. LIABILITY FOR TAX:

"The employer shall be liable for the payment of the tax required to be deducted and withheld under this chapter, and shall not be liable to any person for the amount of any such payment."

Sec. 6011(b):

"IDENTIFICATION OF TAXPAYER. — The Secretary or his delegate is authorized to require such information with respect to persons subject to the taxes imposed by chapter 21 or chapter 24 as is necessary or helpful in securing proper identification of such persons."

Sec. 6051(a):

"REQUIREMENT. — Every person required to deduct and withhold from an employee a tax under section 3101 or 3402, or who would have been required to deduct and withhold a tax under section 3402 if the employee had claimed no more than one withholding exemption, shall furnish to each such employee in respect of the remuneration paid by such person to such employee during the calendar year, on or before January 31 of the succeeding year, or, if his employment is terminated before the close of such calendar year, on the day on which the last payment of remuneration is made, a written statement showing the following:

(1) the name of such person,

(2) the name of the employee (and his social security account number if wages as defined in section 3121(a) have been paid,

(3) the total amount of wages as defined in section 3401(a);

(4) the total amount deducted and withheld as tax under section 3402,

(5) the total amount of wages as defined in section 3121(a), and

(6) the total amount deducted and withheld as tax under section 3101.

In the case of compensation paid for service as a member of a uniformed service, the statement shall show,

in lieu of the amount required to be shown by paragraph (5), the total amount of wages as defined in section 3121(a), computed in accordance with such section and section 3121(f)(2)."

Sec. 6051(c):

"ADDITIONAL REQUIREMENTS. — The statements required to be furnished pursuant to this section in respect of any remuneration shall be furnished at such other times, shall contain such other information, and shall be in such form as the Secretary or his delegate may by regulations prescribe."

Sec. 6051(d):

"STATEMENTS TO CONSTITUTE INFORMATION RETURNS. — A duplicate of any statement made pursuant to this section and in accordance with regulations prescribed by the Secretary or his delegate shall, when required by such regulations, be filed with the Secretary or his delegate."

Sec. 6161(b):

"AMOUNT DETERMINED AS DEFICIENCY. — Under regulations prescribed by the Secretary or his delegate, the Secretary or his delegate may extend, to the extent provided below, the time for payment of the amount determined as a deficiency:

(1) In the case of a tax imposed by chapter 1 or 12, for a period not to exceed 18 months from the date fixed for payment of the deficiency, and, in exceptional cases, for a further period not to exceed 12 months.

(2) In the case of a tax imposed by chapter 11, for a period not to exceed 4 years from the date otherwise fixed for payment of the deficiency.

An extension under this subsection may be granted only where it is shown to the satisfaction of the Secretary or his delegate that the payment of a deficiency upon the date fixed for the payment thereof will result in undue hardship to the taxpayer in the case of a tax imposed by chapter 1, to the estate in the case of a

tax imposed by chapter 11, or to the donor in the case of a tax imposed by chapter 12. No extension shall be granted if the deficiency is due to negligence, to intentional disregard of rules and regulations, or to fraud with intent to evade tax."

Sec. 6201(a) ASSESSMENT AUTHORITY.

"AUTHORITY OF SECRETARY OR DELEGATE. — The Secretary or his delegate is authorized and required to make the inquiries, determinations, and assessments of all taxes (including interest, additional amounts, additions to the tax, and assessable penalties) imposed by this title, or accruing under any former internal revenue law, which have not been duly paid by stamp at the time and in the manner provided by law. Such authority shall extend to and include the following:

"(1) TAXES SHOWN ON RETURN. — The Secretary or his delegate shall assess all taxes determined by the taxpayer or by the Secretary or his delegate as to which returns or lists are made under this title."

Sec. 6204(a):

"GENERAL RULE. — The Secretary or his delegate may, at any time within the period prescribed for assessment, make a supplemental assessment whenever it is ascertained that any assessment is imperfect or incomplete in any material respect."

Sec. 6513(b):

"PREPAID INCOME TAX. — For purposes of section 6511 or 6512, any tax actually deducted and withheld at the source during any calendar year under chapter 24 shall, in respect of the recipient of the income, be deemed to have been paid by him on the 15th day of the fourth month following the close of his taxable year with respect to which such tax is allowable as a credit under section 31. For purposes of section 6511 or 6512, any amount paid as estimated income tax for any taxable year shall be deemed to have been paid on the last day prescribed for filing the return under sec-

tion 6012 for such taxable year (determined without regard to any extension of time for filing such return)."

Sec. 6651(a):

"ADDITION TO THE TAX. — In case of failure to file any return required under authority of subchapter A of chapter 61 (other than part III thereof), of subchapter A of chapter 51 (relating to distilled spirits, wines, and beer), or of subchapter A of chapter 52 (relating to tobacco, cigars, cigarettes, and cigarette papers and tubes), or of subchapter A of chapter 53 (relating to machine guns and certain other firearms), on the date prescribed therefor (determined with regard to any extension of time for filing), unless it is shown that such failure is due to reasonable cause and not due to willful neglect, there shall be added to the amount required to be shown as tax on such return 5 percent of the amount of such tax if the failure is for not more than 1 month, with an additional 5 percent for each additional month or fraction thereof during which such failure continues, not exceeding 25 percent in the aggregate."

Sec. 6653(a):

"NEGLIGENCE OR INTENTIONAL DISREGARD OF RULES AND REGULATIONS WITH RESPECT TO INCOME OR GIFT TAXES. — If any part of any underpayment (as defined in subsection (c)(1) of any tax imposed by subtitle A or by chapter 12 of subtitle B (relating to income taxes and gift taxes) is due to negligence or intentional disregard of rules and regulations (but without intent to defraud), there shall be added to the tax an amount equal to 5 percent of the underpayment."

Sec. 6653(b):

"FRAUD. — If any part of any underpayment (as defined in subsection (c)) of tax required to be shown on a return is due to fraud, there shall be added to the tax an amount equal to 50 percent of the underpayment. In the case of income taxes and gift taxes, this amount shall be in lieu of any amount determined under subsection (a)."

SEC. 7201. ATTEMPT TO EVADE OR DEFEAT TAX:

"Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 5 years, or both, together with the costs of prosecution."

SEC. 7203. WILLFUL FAILURE TO FILE RETURN, SUPPLY INFORMATION, OR PAY TAX:

"Any person required under this title to pay any estimated tax or tax, or required by this title or by regulations made under authority thereof to make a return (other than a return required under authority of section 6015 or section 6016), keep any records, or supply any information, who willfully fails to pay such estimated tax or tax, make such return, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 1 year, or both, together with the costs of prosecution."

GENERAL STATEMENT AND BUREAU PROCEDURE NEGATIVING WILLFULNESS

In a prosecution for willful failure to file income tax returns, one would expect to find evidence of rather sinister conduct, or evil motives on the part of the defendant. Such conduct or motive, it would seem, should disclose some attempt by the defendant amounting to evasion of taxes; or at least some attempt to conceal, or conduct specifically proving the existence of an evil motive on the part of defendant to conceal his taxable status from the Director of Internal Revenue.

Such evidence does not exist in this case

On the contrary, defendant caused an income return to be filed for each year involved herein when he requested the filing of W-2's by his part-time employers.[1] Accord-

[1] I.T. 3820 (1946) "The Withholding Statement (Form W-2), relating to wages paid and income tax withheld, is an income return within the meaning of section 55(f)(1) of the Internal Revenue Code, and that section of the Code would apply if a copy of the statement were to be furnished to any person other than the individual employee concerned.

Advice is requested whether copies of the Withholding Statement (Form W-2), relating to wages paid and income tax withheld, may properly be furnished by an employer to a municipal agency.

Section 55(f)(1) of the Internal Revenue Code provides in part that it shall be unlawful for any person to print or publish in any manner whatever not provided by law any income return, or any part thereof or source of income, profits, losses, or expenditures appearing in any income return. Section 29.55(b)-1 of Regulations 111 provides that any properly authorized official body, or commission, lawfully charged with the administration of any State tax law, or properly designated representatives of such official, body, or commission, may, in the discretion of the Commissioner, inspect income returns for the purpose of such administration. Section 29.55(b)-1 of Regulations 111 also provides that for the purposes of that section the word "returns" shall include information returns, schedules, lists, and other written statements filed with the Commissioner designed to be supplemental to or to become a part of income returns.

The Withholding Statement (Form W-2) is furnished by employers to employees in accordance with section 1625(a) of the Internal Revenue Code. Section 1625(b) of the Code provides in part that a duplicate of such statement if made and filed in accordance with regulations prescribed by the Commissioner, with the approval of the Secretary, shall constitute the return required to be made in respect of employees' wages under section 147 of the Code, which relates to returns of information as to payments of $500 or more.

It is held, therefore, that Withholding Statement (Form W-2) is an income return within the meaning of section 55(f)(1) of the Code, and that section of the Code would apply if a copy of the statement were to be furnished to any person other than the individual employee concerned. Accordingly, copies of the Withholding Statement (Form W-2) may not properly be furnished by an employer to a municipal agency.

Any person who is entitled, under section 55 of the Code and the regulations issued thereunder, to information included in a Withholding Statement (Form W-2) may procure it by proper application to the Bureau of Internal Revenue. Cf. I.T. 3677, C.B. 1944, 174, relative to the Employee's Withholding Exemption Certificate (Form W-4)."

ingly, the government was aware of defendant's taxable status, inasmuch as a Form W-2 is an official document in the office of the District Director.

Similarly, defendant was aware that the filing of a W-2 and the withholding and payment to the District Director of tax from his wages caused an account to be set up in his name in the District Director's office in Baltimore. This account remained an open account pending the receipt of his final returns by the District Director (App. 16, 28).

Bureau Procedure

It is imperative to a thorough consideration of the issue of willfulness involved herein that a full understanding of the appropriate procedures within the District Director's office be kept in mind. At the risk of being tedious we set forth below, in considerable detail, the way the withholding system works. The very nature of the system answers many of the questions which will arise in the minds of the Court about this case, and dispels any doubts the court may have as to defendant's fraud or concealment, or evil motive which is the crucial issue in the case. The government now has a system of withholding taxes (I.R.C. Sec. 3402(a)). This system functions substantially as follows.

An employee subject to withholding (which defendant was) files with his employer an exemption certificate (I.R.C. Sec. 3401(e); 3402(f)) on which the employee claims the number of exemptions, or a lesser number if he chooses, to which he is entitled. The employee is entitled to a $600 exemption for each dependent he claims and withholding of tax is made by the employer on the employee's wages in excess of his claimed exemptions.

(In the present case defendant was entitled to 4 exemptions — himself and three children. This would total $2400 of exemptions, and if defendant claimed all of his allowable exemptions, his employers could have paid him $2400

in wages before any tax would have been withheld. It would appear that defendant claimed only one, or none of his exemptions. This is the only inference that can be drawn from the amount of tax withheld from the wages shown on his W-2's (Def. Exh. No. 1, App. 47). If defendant had claimed all of his exemptions, no tax would have been withheld from his wages.)

The tax withheld by employer is forwarded quarterly to his District Director of Internal Revenue together with the names of the employees and their respective amount of taxes withheld. In determining as of what date the tax is paid, when it is paid by withholding, the Internal Revenue Code states that the payment of withholding tax at the source "shall, *in respect of the recipient of the income, be deemed to have been paid by him* on the 15th day of the fourth month following the close of his taxable year. . . ." (I.R.C. Sec. 6513(b) relating to claim for refunds, etc.) (Italics supplied.) At the end of the year the employer completes W-2's of which one copy is forwarded to the District Director of Internal Revenue; two copies to employee, and one copy is retained by employer (I.R.C. Sec. 3403; 6011(b); 6051(a)(c)(d)).

The government requires such information on W-2's "as is necessary or helpful in securing proper identification of such persons" (I.R.C. Sec. 6011(b)).

The District Director receives the money sent by employer and credits the tax to the account of the respective taxpayer for whom it was paid.

Knowledge by this Court of the procedure followed in the District Director's office subsequent to the receipt by him of W-2's is vital, as follows:

Upon receipt of W-2's, the District Director holds them for disposition in one of the three following ways:

1. When taxpayers file their final return for the year, the District Director associates the W-2's he has

with the tax returns filed by the respective taxpayers and the bulk of the W-2's in the District Director's office are disposed of in that manner.

2. Some taxpayers, because of the small size and nature of their income, are entitled to file a special form (1040A) without computing the tax. The District Director then computes the tax due by such taxpayer and either sends the taxpayer a bill for the additional amount due if the amount withheld is insufficient; or sends a refund in the event of an overpayment through withholding. In this manner another large number of W-2's in the possession of the District Director's office are disposed of by associating them with the 1040A's sent in by taxpayers described in this paragraph 2.

3. After the procedure outlined in paragraphs 1 and 2 above are completed, the District Director usually has a number of W-2's left which have not been associated or matched up with the final return of the respective taxpayer for the reason that the final return has not been filed. These unmatched W-2's would constitute the list of delinquent returns of which the District Director has official notice. In addition to the unmatched W-2's held by the District Director, he also has an open account standing in the name of the respective taxpayers for the amount of tax appearing on the W-2 as having been withheld and paid over to the District Director by the employer.

Defendant was aware of the existence of his open account in the office of the District Director (App. 16, 28). He knew that the filing of a W-2 by his employer put the District Director on notice that he was in a taxable status; and in at least two instances, defendant's employers would not have filed W-2's for him, and withheld tax from his wages if defendant had not insisted that they do (App. 13, 14, 15).

The District Director first communicated with defendant about his delinquent returns on November 14, 1955 (Exh. 2A). In passing, it is appropriate to make a few observations about this Exhibit. The address to which the letter was directed was the same address appearing on defendant's W-2 filed for 1952 indicating that the District Director was making his long overdue inquiry as to defendant's delinquent returns. Secondly, although the letter of November 14, 1955 was the first communication from the District Director's office about defendant's delinquent returns, defendant was instructed to reply to 327 Calvert Building—the address of the Intelligence Division which is charged with the investigation of alleged criminal violations. Obviously, the filing of a W-2 contained sufficient information "as is necessary or helpful in securing proper identification of such person" (I.R.C. Sec. 6011(b)).

STATEMENT OF FACTS

There is no dispute as to the facts. The defendant was born in Baltimore thirty-seven years ago. He was married on January 1, 1940, in the Mount Vernon Methodist Episcopal Church, and has three daughters, aged 14, 12, and 5. He attended the public schools in Baltimore and was graduated in 1937 from the Baltimore City College. He studied law at night at the University of Baltimore Law School, from which he was graduated in June 1940. He is a member of the Bar of the State of Maryland, the Baltimore City and Baltimore County Bars. He was employed from September, 1939 until August, 1942 as an Assistant Underwriter in the Public Liability Department at the Maryland Casualty Company. He was then employed for a short time by the Western Electric Company, Point Breeze, and in 1942 was employed as an Investigator in the Rent Control Section of the Office of Price Administration, Baltimore, Maryland. He remained with the Office of Price Administration

until February 1944, when he went with the law firm of Rome, Rome and Hamburger. He was with that firm until July, 1944, at which time he was inducted in the United States Navy. He served in the Navy until February 22, 1946, when he was honorably discharged. While in the Navy he received instruction as Chaplain's Assistant and served as such in Japan. He returned to the practice of law in Baltimore in 1946 and has continued in such occupation to the present time. He has had part-time employment and W-2's (Withholding Tax Statements) were filed with the Director of Internal Revenue at Baltimore for 1952, 1953 and 1954 as follows:

> *For the year 1952* by Eastern Woodworks, Inc., showing earnings of $800.00 and a tax withheld of $164.00.
>
> *For the year 1953* by St. Thomas Church, showing earnings of $800.00 and no tax withheld
>
> *For the same year, that is, 1953* by the Church of the Incarnation, showing that the defendant had earned $666.68 and that a tax was withheld in the amount of $88.40.
>
> *For the year 1954* by the Church of the Incarnation, showing the defendant had earned $1,500.03 and a tax withheld of $179.10.

The lack of funds together with his reliance upon the government's instruction sheet stating that the balance of tax due "must be paid with your return" (App. 25, 27; Def's. Exh. 6) was defendant's reason for not filing (App. 25). He intended to pay when he accumulated the money (App. 26). Throughout the period of non-filing, however, defendant knew that he had disclosed his taxable status to the District Director by his payment of withholding tax and the filing of W-2's (App. 13, 15, 16, 28).

The defendant's law practice was, and still is, an insubstantial one. He had to overcome the handicap of losing four years from practice while in the service — four important years to a young lawyer who is trying to gain a foothold in his profession.

The defendant's bank statements reveal he was always hard pressed financially.

The defendant gave a question and answer statement on November 18, 1955 to the Intelligence Division, Internal Revenue Service, Baltimore, Maryland. It is emphasized that the statement of November 18, 1955 was given spontaneously by the defendant, without any forewarning, preparation, opportunity to consult records, or counsel. Owing to the lack of opportunity to consult his records, it is conceded by the government that he made some inaccurate statements that were detrimental to him. For example, in answer to the agent's questions, which the agent must have considered important, the defendant stated that W-2's were not filed for him while he was employed at St. Thomas Church. Actually, they were filed for him by that church and were in fact filed for him during all the years he failed to file returns. It is significant to note that in 1952 defendant caused a W-2 form to be filed and tax withheld for him, at his insistence, by Eastern Woodworking Company, a client, whereas presumably he could have received his compensation for services rendered to said company, had he elected to do so, as legal fees for which no W-2 would have been required and no tax would have been withheld. This is of the utmost importance and goes directly to the question of negativing wilfulness. It may be that if the facts had been developed more reliably during investigation by government's agents, the case would not have been recommended by them for criminal prosecution or, such recommendation having been made by the agent, it is possible a higher review would result in a recommendation

that the case not be prosecuted and would have been disposed of civilly for which there are sundry, adequate remedies available to the government under provisions of the Internal Revenue Code. This is especially plausible since the agents, having taken a statement from the defendant and investigated the matter, cancelled an appointment set up by the agents for the purpose of giving defendant an opportunity to come in with counsel and be heard in view of the fact that criminal proceedings were being considered (App. 18, 19, Def. Exh. 2-B). It is customary to grant an administrative hearing in Baltimore in such cases prior to a recommendation for prosecution being made. After such conference is held and after such recommendation is made, the case is sent to the Regional Office in Philadelphia. A conference in Philadelphia was granted in this case but the only hearing was on the record (App. 18), which was erroneous in part and lacking in much information favorable to defendant as noted above. The failure to accord the defendant an administrative hearing in Baltimore would seem to indicate precipitate action on the part of the agents and inadequate consideration of the question whether the case was really one that merited criminal prosecution.

Of especial significance, and as additional evidence which negatives willfulness is the fact (although this is not specifically covered in the testimony, the government will not dispute nor disagree with this statement) that defendant, by claiming all of the exemptions on his W-2 to which he was entitled by law, (which he elected not to do), could have avoided any tax being withheld from the wages he received.

As to every fact in issue in the trial of the case, there is no conflict in the evidence. The controversy here is whether such facts amount to willfulness. Defendant's testimony was frank and candid. He carried on all of his transactions through a checking account; his complete records, for all

years, were available and turned over to the government's agents upon request in order to enable the agents to verify the computations and schedules furnished the agents by defendant.

He had never done anything to conceal or disguise the true nature of his transactions, or hidden anything away.

It is significant to note that the government, in the tax computation, is not claiming the total tax due, but is claiming only a deficiency in tax inasmuch as defendant had paid part of his tax through withholding (App. 11).

SUMMARY OF TESTIMONY OF GOVERNMENT'S WITNESSES

In any criminal prosecution under the income tax laws, the government has a heavy burden of proof to carry in proving the defendant guilty beyond a reasonable doubt of the crime charged.

The narrow and crucial issue in this case is whether the government met this burden of proof under a statute which denounces as criminal the willful failure to file income tax returns.

Four employees of the Internal Revenue Service constituted the only witnesses to testify against defendant.

A summary of their testimony reveals a complete absence of the criminal conduct contemplated by Congress, by the statute, and by the cases thereunder, which will support the heavy burden placed upon the government. Such a summary follows:

Henry T. McNamara (St. Tr. pp. 4-6)

Mr. McNamara is employed by the District Director of Internal Revenue in Baltimore and the only purpose of his testimony was to confirm the fact that defendant had not filed income tax returns for the years involved.

Thomas B. Carney (App. 1-4)

Mr. Carney is employed by the District Director of Internal Revenue and is attached to the Intelligence Division. He first met defendant on November 18, 1955, the latter having come to Mr. Carney's office in response to a letter from the Bureau dated November 14, 1955 (Defendant's Exh. 2A). At that initial interview, which defendant attended alone, Mr. Carney took a question and answer statement under oath from defendant, and Mr. Carney identified the statement as the one introduced at the trial of this case (Government's Exh. 1). Mr. Carney had no further interview with defendant.

The foregoing summarizes the complete direct examination of Carney.

On cross-examination, the following additional information was elicited: At the time of defendant's interview on November 18, 1955, defendant had no records with him; defendant was cooperative; and defendant turned over his records to the agent (Haspert). Mr. Carney did not participate in the investigation other than the original statement (Government's Exh. 1). After the Intelligence Division got into the case, Mr. Carney was substantially in charge of the investigation. Mr. Carney stated he thought defendant had received W-2's from some of his employers, but he didn't know offhand what years were filed for him. Mr. Carney stated that a fraud penalty, which is imposed when there has been an attempt to evade taxes, or for a willful evasion, had been recommended in this case.

The foregoing summary comprises all of the facts testified to by Mr. Carney.

Peter P. Haspert (App. 5-8)

Mr. Haspert is a Special Agent of the Intelligence Division of the Internal Revenue Section. He was present at the first, as well as subsequent interviews of the defendant.

At the request of the agents, defendant prepared and submitted schedules to the agents listing all of his clients and fees received therefrom for the years involved. Thereafter, Haspert verified the accuracy of these schedules from defendant's records, which were turned over to the agents, as well as by verification from the clients whom the agents contacted.

Haspert quotes defendants as having stated, in response to Haspert's question, that he knew he could have filed income tax returns without remittances. (Defendant does not deny this conversation but stated he told Haspert he knew it "now".)

The foregoing consists of the complete direct examination of Mr. Haspert.

On cross-examination, the following additional information was elicited:

There were no material inaccuracies in the schedules of fees prepared by defendant and submitted to the agents.

The foregoing summary comprises all of the facts testified to by Mr. Haspert.

Robert D. Wheeler (App. 8-12)

Mr. Wheeler is a Revenue Agent attached to the District Director of Internal Revenue in Baltimore. Mr. Wheeler calculated the tax liability of defendant for the years involved using the income and expense figures submitted to him by defendant, which figures were found by the agents to be accurate.

From the tax found to be due for the year 1953 in the amount of $1021.32, Mr. Wheeler allowed a credit against that figure of $88.40 for the amount of tax paid by defendant through his withholding, making the deficiency due for 1953 $932.92. For 1954, the tax found to be due was $1041.58 from which the tax paid by defendant through

withholding in the amount of $179.10 was allowed, making the deficiency due for that year $962.48.

There was no cross-examination of Mr. Wheeler and the foregoing summary comprises all the facts testified to by him.

The entire testimony produced by the government against defendant is summarized in the foregoing summaries.

THE COURT'S THEORY OF GUILT

The Findings of the Court on which its conclusion of guilt is based are as follows:

(1) "The failure to file the return for both years was voluntary, purposeful, deliberate and intentional, and not accidental, inadvertent or negligent" (App. 33).

(2) "I find that defendant knew that the returns ought to have been filed and that he deliberately failed to file them so that the government would not know the extent of his income and of his tax liability" (App. 33).

(3) "I find that the failure to file was without justifiable excuse" (App. 34).

(4) "If the government did have such a burden (of proving that defendant intended or attempted to evade the payment of taxes) I find that it was met in this case. That is a natural inference from the evidence in this case, and no other motive or purpose has been suggested" (App. 34).

(5) "The reason why the defendant did not file his tax returns, namely, that he did not have the money to pay the taxes is not a legal excuse" (App. 34).

(6) "I find as a fact that the defendant knew that he had to file a return whether or not he paid the tax, and that he knew that he could and should pay the estimated tax quarterly in advance" (App. 34).

(7) The government "has proved beyond a reasonable doubt that the failure to file the returns was willful" (App. 35).

(8) "I am bound to find in this case that the defendant was obligated to file the returns, that he did not file

them, and that such failure to file was willful. . . ." (App. 35).

ARGUMENT

I.

THE GOVERNMENT DID NOT MEET ITS BURDEN OF PROVING AN AFFIRMATIVE WILLFUL ATTEMPT TO EVADE TAX.

In enacting the Internal Revenue Code of 1954, Congress has characterized all criminal offenses under the Internal Revenue Code as "what in substance is the same offense, namely, the attempt to evade tax" (83rd Congress, 2d Session, Report No. 1622, page 147).

The House bill provided uniform penalties for such criminal offenses, but the Senate, recognizing the equities in subjecting misdemeanors to lesser penalties than felonies, revised the penalty provisions of the House bill from 5 years' imprisonment to 1 year, but allowed the $10,000 maximum fine under the House bill stand. The Senate, however, did not qualify its statement that all criminal offenses were in substance the attempt to evade tax.

It is significant that this statement by Congress — that all criminal offenses constitute the attempt to evade tax — was made at the time when Congress brought all criminal offenses together in one chapter of the Internal Revenue Code; and, at the same time, made substantial revisions to various sections of the criminal statutes, including the revision of Section 145(a), now Section 7203.

In view of this clear expression of Congressional intent as to the burden the government should be required to meet in prosecutions for criminal offenses under the tax laws, it is obvious that the proof in this case has fallen far short of proving affirmative willful attempt to evade tax.

In employing the phrase "attempt to evade tax", Congress was undoubtedly cognizant of the Supreme Court's definition thereof which was fully treated in the *Spies* case (*Spies v. U.S.*, 317 U.S. 492). In that case, the Supreme

Court, in deciding what Congress intended by using the word "attempt" in Section 145(b) of the Internal Revenue Code (now Section 7201), stated as follows:

> "We think that in employing the terminology of attempt to embrace the gravest of offenses against the revenues Congress intended some willful commission in addition to the willful omissions that make up the list of misdemeanors."
>
> . . . . . .
>
> "Congress did not define or limit the methods by which a willful attempt to defeat and evade might be accomplished, and perhaps did not define lest its efforts to do so result in some unexpected limitation. . . . By way of illustration, and not by way of limitation, we would think affirmative willful attempt may be inferred from conduct such as keeping a double set of books, making false entries or alterations, or false invoices or documents, destruction of books or records, concealment of assets or covering up sources of income, handling one's affairs to avoid making the records usual in transactions of the kind, and any conduct, the likely effect of which would be to mislead or to conceal. If the tax evasion motive plays any part in such conduct the offense may be made out even though the conduct may also serve other purposes such as concealment of other crime."

In the *Spies* case, the Supreme Court held that the failure to file returns, and the failure to pay the tax did not constitute the affirmative act necessary to prove an attempt to evade tax.

We are not arguing that the government must prove a felony in order to sustain a conviction for a misdemeanor, though even the Supreme Court noted in the *Spies* case that the difference between the two "is not easy to detect or define". But we do vigorously contend that in a prosecution for the misdemeanor of failing to file returns, Congress intends the government to produce evidence of some affirmative act which would tend to prove an attempt to evade or

defeat the tax, or which would tend to show a tax evasion motive or intent on the part of defendant.

It is reasonable to assume Congress means that the government should prove some positive and affirmative conduct on the part of defendant in prosecutions for criminal tax offenses. Mere failure to act, the Supreme Court has stated, is not sufficient to constitute such affirmative conduct.

As will be treated more fully in a later section of this brief, it is our contention that even if this court rejects the contention made here, namely that the government in this case must prove an attempt to evade tax, nevertheless, we contend the government must still prove some affirmative conduct on the part of the defendant to prove a bad motive, or evil intent which the Supreme Court has said, is required to prove willfulness. (*U.S. v. Murdock*, 290 U.S. 389).

A reading of only a few cases is necessary to see the facility with which the government can convict defendants who are in fact tax evaders, despite the myriad of devices employed by such defendants to evade tax. If a taxpayer has in fact attempted to deceive or cheat his government, it is not at all difficult for an experienced tax investigator to trip him up somewhere during the investigation by showing conflicting stories, explanations inconsistent with the facts; concealment of income, or conduct which unquestionably is fraudulent or deceitful, or evasive.

There is a complete absence of such conduct in this case.

A few examples of what the government could have shown, in order to discredit defendant, had such evidence been available, are as follow:

1. A cash balance sufficient to pay defendant's taxes. This fact would have disproved his explanation of lack of funds.
2. Fees in excess of those listed by defendant on the schedules turned over to agents. The accuracy of the

fees listed, however, was verified by the agents by contacting the clients.

3. Inability of defendant to compile a statement of his income because of absence of such records. This would have disproved defendant's statement that he always intended to file his returns and pay his tax when he had sufficient cash to do so.
4. A current position with all other creditors except the Internal Revenue Service. This would have shown an ability and willingness to pay his debts and a disposition to overlook his taxes.
5. Excessive personal expenditures inconsistent with his avowed depressed financial condition.
6. Some later statement made by defendant, or other evidence, inconsistent with the facts given by defendant in his initial statement to the agents (Exh. 1).

Even as inconclusive as one or all of the foregoing pieces of evidence might be, as well as other examples which could be cited, there is not even that much in the case.

No evidence of any affirmative act of evasion, etc. was introduced into the case, either by the government's own witnesses nor by defendant. As shown above, a failure to file does not constitute the affirmative act contemplated by an attempt to evade tax. No other affirmative act is cited by the trial Court in support of its findings.

The trial Court did not specifically rule that the government had the burden of proving an attempt to evade tax, despite a request for an instruction to that effect. In fact, the Court stated "I do not think it is necessary for the government to prove . . . that defendant intended or attempted to evade the payment of taxes." "But if the government did have such a burden," the Court said, "I find that it was met in this case. That is a natural *inference*

from the evidence in this case and no other motive or purpose has been suggested."

This process of inferring proof of an affirmative attempt from defendant's omission to act is precisely what the Supreme Court prohibited by its opinion in the *Spies* case. Moreover, a later statement made by the trial Court at the time of sentence, would seem to be at variance with a finding that defendant "intended or attempted to evade the payment of tax." The Court said "this is not a case where the failure to file was because of any improper activity on the side or because the person was accumulating money and was trying to hide it away" (App. 37).

In addition to that, the Court said of this case "this is not one of the most serious types of cases" (App. 39).

There is one colloquy we would specifically bring to the attention of this court as bearing upon the issue of the attempt to evade taxes.

Defendant, as is obvious from the record, contended that the government in meeting its burden of proof, was required to prove an affirmative willful attempt on the part of defendant to evade taxes. Pursuant to this theory the defendant, in the course of his direct examination, began to offer testimony to disprove the existence of any intent to evade taxes. Following the first question in this line of defense, the following colloquy occurred:

> "(The Court) He is not charged with that. I mean, he is not charged under 145(b).
>
> (Mr. Mundy) All right. Well, of course, Your Honor, the reason I asked the question was under our theory it is pertinent. I know that the government does not agree with us, but I thought I should get the factual situation. That was the reason" (App. 26).

We submit that this court is entitled to make the inference from the above colloquy that up to that point in the case, which was after the completion of the govern-

ment's case and well into defendant's testimony, the government had not proved any attempt to evade taxes. Otherwise, the trial Court would have been anxious to hear anything defendant had to say in his defense on that issue.

We submit that the complete absence of any evidence of an affirmative act, together with recognition by the Court that this is not one of the most serious types of cases, shows conclusively that the government has not met its burden of proof and the Court should have granted defendant's request for acquittal.

II.

THE GOVERNMENT DID NOT MEET ITS BURDEN OF PROVING BAD FAITH OR EVIL MOTIVE, WHICH THE STATUTE MAKES AN ELEMENT OF THE OFFENSE.

If this Court rejects defendant's first argument that the Government, although required to do so, has failed to prove an affirmative wiilful attempt to evade tax, we then come to the present argument, namely, that the Government has not met its burden of proving bad faith or evil motive as an element of the offense.

The Court and defendant are in no disagreement that defendant's failure to file, in order to constitute the offense charged, must be willful.

The Court and defendant are sharply divided on the issue of the elements constituting willfulness, and whether the facts of this case amount to proof of willfulness. Defendant contends that they do not, inasmuch as no evil motive has been proved.

This is not a case wherein the Court has cited facts from the record in support of a finding of bad purpose or evil motive, and on the basis of such evil motive finding willfulness.

It is instead a case where the Court cites facts from the record from which facts the Court has inferred willfulness.

without also finding the element of evil motive which is an essential element of the offense.

The Court did not grant any of defendant's requests for instructions that a bad purpose or evil motive had to be proved by the Government, as part of its burden of proof. At the conclusion of sentencing the issues which would be argued on appeal were discussed by the Court and counsel for both parties. Again the Court was asked, inferentially at least, to rule upon the question of evil motive (App. 41).

The Court stated, "I found that the motive which I stated in my opinion was a sufficient motive to satisfy that requirement if such a requirement existed, and I stand by that ruling" (App. 41). The Opinion, however, does not yield up a specific finding of evil motive.

In view of the Court's steadfast refusal to rule that as part of its burden of proof the Government had to prove a bad purpose or evil motive; and in view of the Court's refusal to specifically find an evil motive, though requested to do so, defendant contends his request for acquittal should have been granted.

In sum, it may be fairly stated that the testimony of Government's witnesses, which is summarized in an earlier part of this brief, proved no more than that defendant's failure to file was voluntary or knowing. The Government's proof nowhere near approached proof of an evil motive which the Supreme Court has held is a "constituent element" of crime (*U. S. v. Murdock*, 290 U.S. 389).

We must now respectfully ask this Court, tedious though it may be, to examine with us the findings of the Court enumerated under the section of this brief entitled "The Court's Theory of Guilt", and the evidence which defendant contends will not support a finding of willfulness in this case.

(a) — It was Beyond Defendant's Power to Conceal Tax Liability.

Under the section of this brief entitled "The Court's Theory of Guilt", we have listed eight findings which were set forth in the Court's opinion upon which the Court based its verdict of guilt.

These findings group themselves into four categories, as follows:

(1) Those findings which show no more than voluntary and intentional non-filing, or that such non-filing was without justifiable excuse. In this category are findings numbers 1, 3, 5, 6 and 8. If the Court is right in its view that the findings in this group meet the test of willfulness, *without* specific proof or finding of evil motive, then defendant concedes the Government has met its burden of proof.

(2) Finding No. 4 wherein the Court found that the Government had proved defendant, by his failure to file, "intended or attempted to evade the payment of taxes." Defendant will stand on his contention, as heretofore argued, that there is a complete failure of proof under this finding.

(3) Finding No. 2 that the failure to file was in effect an act of concealment of tax liability. Defendant recognizes this finding as the crucial one to answer.

(4) Finding No. 7 which is the ultimate finding of willfulness by the Court.

Defendant contends that groups 1 and 2 above will not support a conviction, as has heretofore been demonstrated.

Groups 3 and 4 above will be treated in this section of the Brief.

The finding by the Court that defendant knew returns "ought to have been filed and that he deliberately failed to file them so that the government would not know the ex-

tent of hi income and of his tax liability" would appear to be a permissible inference, except for reasons stated hereinafter, and, if such failure were specifically shown to have been prompted by some *evil motive*, then the government would have met its burden of proof. Were it not for the existence of significant facts which we will now point out, this Court could easily fall into the same error as the trial court did in overlooking such facts.

Re-phrasing the finding of the Court involved in this immediate discussion the Court in effect finds that the defendant's failure to file was to prevent the Government from knowing of Defendant's tax liability.

The Court then infers from this that defendant intended not to pay his taxes and that such intention constituted an attempt to evade the payment of his taxes. That this is the Court's inference is stated specifically by the Court, wherein it said, "No other motive or purpose has been suggested" (App. 34).

The indisputable fact is that it was through the efforts of defendant that his taxable status was made known to the Government by his insistence that his various employers withhold tax from his wages and file the necessary W-2 forms with the District Director (sometimes referred to as Collector) (App. 13, 14, 15).

As a result of the filing of W-2 forms and the payment to the Collector of the tax withheld, defendant was aware of the fact that there was an account set up in his name in the Collector's office (App. 16, 28), and it was therefore beyond his power to conceal his tax liability.

The fact that this account remained open in the Collector's Office was knowledge to the Collector that defendant had not filed his final return for each year (I.R.C. Sec. 6011(b); 6051(d); 6201(a); 6204(a)). So the Defendant was not concealing from the Collector the fact that a tax liability existed — the fact is that the Collector was

aware of defendant's liability and that defendant had already paid some tax. The only thing unknown to the Collector was whether defendant's withholding overpaid his tax, in which event the Collector owed defendant a refund; or whether defendant owed more tax. The Collector could easily ascertain this fact by communicating with defendant, as he was in fact required by Statute to do (I.R.C. Sec. 6201(a); 6204(a)), and asking him to file his return if one was due. That is precisely what the Collector did when he wrote to defendant on November 14, 1955 (Def.'s Ex. 2A). It will be noted that the address on this letter is the same address appearing on defendant's W-2 for 1952. This is indisputable proof that defendant's insistence that a W-2 be filed for him (App. 13) put the Collector squarely on notice of defendant's taxable status. It is true that the tax shown on the W-2 was not the full tax due by defendant, but the reason the balance of tax was not paid and his returns were not filed was because defendant did not have the funds to pay. Even if the lack of funds is not accepted as defendant's reason for not filing his returns, the record will not support the finding that defendant failed to file so that the government would not know "of his tax liability." Defendant's tax liability was known by the Government immediately upon receipt by it of the respective W-2's which defendant caused to be filed. That defendant caused W-2's to be filed has not been disproved by the Government (App. 25; Govt.'s Ex. 1, page 6).

The Collector, at all times, here involved, could have written to defendant to request the filing of returns so that the open accounts could be closed out either by a refund or by the payment of additional tax. In fact, it was the Collector's responsibility, knowing of the open accounts, to communicate with defendant in order to bring his account to a current status (I.R.C. Sec. 6204(a)). The payment of taxes to the Collector by the withholding method

caused an account to be set up each year in defendant's name in the Collector's office. Defendant was aware of this (App. 16, 28). After April 15th of any year, the filing date, defendant's account was in an "incomplete" status (Sec. 6204(a)) or what is usually referred to as a delinquent status in the Collector's office. It was delinquent in that the final return had not been filed and this fact was officially known to the Collector.

It is significant to note the testimony of Agent Wheeler wherein he testified that the amount of tax the government was claiming for the years involved, was not the total tax due, but a *deficiency* in tax, because part of defendant's tax had already been paid by withholding (App. 11). As the Internal Revenue Code states, the tax was "deemed to have been paid by (defendant)" (I.R.C. Sec. 6513(b)).

It cannot be disputed that when defendant caused W-2's to be filed for him, which fact is uncontroverted, he was causing an income return to be filed with the Director of Internal Revenue. The Government's own ruling has held this to be so (I.T. 3826, 2 Cum. Bul. 53), quoted in full in footnote 1 hereof).

Upon receipt by the Collector of tax money for defendant's account, an account was set up in defendant's name and a tax was immediately assessed against him in the amount of withheld taxes received by the Collector (I.R.C. Sec. 6201(a)(1)).

It cannot be maintained, therefore, that the failure to file returns prevented the government from knowing of defendant's tax liability. The facts in this case simply will not support such contention. However, if defendant had thereafter filed a return showing just enough income to result in a tax which would equal the amount withheld, then defendant would have unquestionably been guilty of a fraud upon the government.

Defendant contends that the worst the evidence against him shows is that he is a procrastinator. But it seems to us that the Government procrastinated in this case, too. The Government waited several years before it took the steps available to it to secure defendant's delinquent returns and during the entire period of such delay, the Government was aware of defendant's delinquency.

We are not contending that it is the Government's duty to write to all taxpayers to secure their returns. Obviously, the more defaulting taxpayers there are, the greater the burden upon the Government to collect its taxes. But Congress has seen fit to provide for such defaulters by appropriate sanctions in the form of monetary penalties.

We do contend, however, that where the Government has been put on notice by the taxpayer himself, that he is in a taxable status, the Government should take cognizance of its own delinquency, where it was clearly within its power and as has been shown was required to rectify such delinquency known to exist long before it took steps to do so. The Government, under such circumstances, should be under a very heavy burden of proving that this case is "more grievous than a case for civil penalty," as the Supreme Court indicated should be done where the Government jumps from the invoking of civil penalties to criminal prosecutions (*Spies v. U. S.*, supra).

Even if this Court does not accept any of defendant's explanations, the proof amounts to no more than proof of intentional disregard of Rules and Regulations. Congress has anticipated there will be such taxpayers and has provided accordingly in Section 6653(a) of the Internal Revenue Code of 1954 which reads as follows:

> "(a) *Negligence or Intentional Disregard of Rules and Regulations with respect to Income or Gift Taxes* — If any part of any underpayment . . . is due to negligence or intentional disregard of rules and regulations (but without intent to defraud) there shall be added

to the tax an amount equal to 5% of the underpayment."

The trial Court found, in its finding No. 1, that defendant's failure to file was, among other things, intentional. The Court did not make a finding that the failure to file was fraudulent. The Court did, in fact, negative fraud when it stated that "this is not a case where the failure to file was because of any improper activity on the side or because the person was accumulating money and was trying to hide it away" (App. 37).

Clearly, then, the proof amounts to no more than the "intentional disregard of rules and regulations (but without intent to defraud)", for which infraction Congress has provided what it deems to be a sufficient penalty in the above quoted sanction.

(b) — The Prosecution and Proof Adduced are based upon no more than "Probable Cause" of Guilt.

We respectfully direct this Court's attention to the Criminal Information, with especial reference to the affidavit attached thereto (Record on Appeal, page 3).

This affidavit is made by Special Agent Haspert and the significant wording thereof is as follows:

> "As a result of this investigation, he is satisfied that there is probable cause to believe that the said (defendant herein) * * * did willfully and knowingly fail to to make said income tax returns * * *."

Between November 18, 1955, the first day Haspert saw defendant, and April 22, 1957, the date of trial — approximately 18 months — Special Agent Haspert, together with other experienced tax investigators, were, or should have been, securing evidence to support this criminal prosecution, inasmuch as the recommendation for criminal prosecution originated with them (Def. Exh. 2B, App. 50).

Inasmuch as Haspert cited no specific acts of willfulness in his affidavit of "probable cause", it is reasonable to ex-

pect, in fact, it would be mandatory, that he or other government witnesses would testify to facts which clearly prove criminal conduct on the part of the defendant.

Haspert's testimony, as well as testimony of others, reveals an abysmal lack of incriminating evidence. There is not a scintilla of evidence which even tends to cloak this defendant in criminality — unless the mere failure to file constitutes the crime, for the shocking fact is that that is all Haspert's and other government testimony amounts to.

Nor has the defendant himself, though he testified at length, supplied this vital link in the government's burden of proof. On the contrary, Defendant's testimony violently protests and disclaims any willfulness or evil motive.

We submit that if the government is going to dump tax cases into the laps of trial courts, it should be prepared with indisputable proof of criminality, to back up the charges made against defendants instead of putting on a case amounting to no more than "probable cause" and forcing the trial courts, as was done in this case, to wrestle with presumptions, inferences and other intangibles in arriving at guilt. Anyone who is the least bit familiar with tax fraud cases knows how easy it is to prove the necessary elements of criminal willfulness, concealment, evasion, fraud, etc., where such elements actually exist.

The ends of justice would require such specific proof, particularly since tax prosecutions are on the increase according to figures released by the Department of Justice.

The present case is a graphic illustration of why it is necessary that the Government be required to prove an "attempt to evade tax" as Congress has indicated should be the test in criminal tax cases, rather than having the proof rest, as in this case, upon suspicions, presumptions and inferences, as we will now demonstrate.

Where defaults in rigid adherence to statutory requirements for filing returns and paying taxes are involved, we

must condition ourselves on first being exposed to the facts, to resist characterizing all such defaulters as tax evaders, or cheaters, or criminals.

Even Federal Judges may sometimes, unknowingly, allow factors learned from their experience with other tax prosecutions, to weigh more heavily in their deliberation than the facts of the particular case they are considering would warrant. There is some evidence that that may have happened in this case, and is proof positive as to why the Government should not dump "probable cause" cases into the laps of judges without following their allegations of probable cause up with some proof of affirmative criminal conduct.

(A careful examination of the whole record here could easily support the following startling conclusion: That the Government's agents, have inferred fraud from the mere failure to file; on the basis of such inference, Haspert made an affidavit of "probable cause" so as to get the case to Court in the hope and expectation that the Court would back them up and, on the mere inference of fraud, find defendant guilty beyond a reasonable doubt. Unfortunately, that it what the Court did.)

In the present case the Government proved (using the same figures supplied to the Agent by defendant) that defendant had sufficient income to require the filing of returns; proved the tax computations showing the deficiency due; and proved that no returns were filed. The defendant admits all of this. The Government's proof ended at that point.

The trial court, as will be shown, must have attached considerable importance, among other factors in arriving at a guilty verdict, to the fact that defendant had not paid his taxes. That is the natural inference from the finding of the Court that defendant's failure to file was "so that the gov-

ernment would not know the extent of his income and of *his tax liability*" (App. 33). (Italics supplied.)

The next presumption made by the Court must have been that the failure of defendant to pay his taxes permits the inference that his failure to file was in some way related to a willful failure to pay and therefore, such failure to file was willful. That the failure of defendant to pay his taxes was a factor of considerable importance to the Court is apparent from the following statement made by the Court at time of sentence:

> ". . . if business men are to be sent to jail for the failure to pay income taxes, as this court has pretty regularly done . . . the Courts cannot treat differently the lawyers whom they know, . . . and the business men whom they do not know. . . ." (App. 38).

The Court's reference to the regularity with which business men were sent to jail *for failure to pay income taxes* revealed a situation with which we were unfamiliar. An examination was made by this writer of the Court dockets in the Clerk's office of the Federal District Court for Maryland, covering the period of the preceding ten years. The examination failed to disclose a single prosecution during the ten years, *for failure to pay income taxes*.

Obviously, therefore, the Court has not been sentencing defendants to prison for failure to pay income taxes upon their conviction for other offenses. But what the Court must have meant by its statement was that where convictions have been secured, which has been pretty regular, in other tax prosecutions, the failure to pay their taxes has been proved to be due to tax evasion motives, the crime for which they must have been prosecuted; or that the failure to pay was connected with proof of some affirmative attempt to evade the payment of their taxes, such as the filing of a fraudulent return. This latter crime, the Supreme Court has said, is the "gravest of offenses against the revenues" (*Spies v. U.S., supra*). The proof in the present case

simply will not support any tax evasion motives; nor any other evil motives. The crucial fact of this case is that it was beyond the power of defendant to conceal his tax liability, as has heretofore been shown.

Lest there be any doubt as to the point we are trying to make, we will restate it. We do not intend to imply that the defendant was convicted or sentenced because of his failure to pay his taxes. He was not charged with that offense nor was he convicted thereof. But we do contend that the Court must have considered the failure of defendant to pay his taxes to permit the inference that such failure to pay taxes was willful (of which there is no proof), and that this in turn was sufficient to permit the inference that the faliure to file returns was willful.

We submit this is precisely the situation Congress is trying to prevent when it specifically states that all criminal offenses under the tax laws are in substance "the attempt to evade taxes", which would require, under such burden, proof of an affirmative willful attempt of tax evasion.

Furthermore, the Supreme Court has indicated an extremely rigid test should be invoked in cases involving *failure to pay taxes*. Said the Supreme Court:

> "In view of our traditional aversion to imprisonment for debt, we would not without the clearest manifestation of Congressional intent assume that mere knowing and intentional default in payment of a tax where there has been no willful failure to disclose the liability, is intended to constitute a criminal offense of any degree. We would expect willfulness in such cases to include some element of evil motive and want of justification in view of *all the financial circumstances of the taxpayer.*" (*Spies v. U.S., supra.*) (Italics supplied.)

It would appear that the trial court leaned heavily in finding guilt in this case, upon the inference that defen-

dant concealed his tax liability so that he would not have to pay the tax, and that such non-payment of taxes supplies the element of willfulness in his non-filing. If that is so, and there is ample evidence that it may be so, then the trial court has ignored the financial circumstances of taxpayer which the proof indisputably shows was insufficient to pay his taxes. The Supreme Court says the financial circumstances of defendant is a crucial consideration in the proof of the necessary element of evil motive.

Assume for the moment that defendant had been prosecuted for failure to pay his taxes. In view of defendant's poor financial condition, which is admitted, it is reasonable to assume, in view of the Supreme Court's language quoted above, that defendant would have been acquitted of such charge, carrying with it the irresistable conclusion that there was no evil motive in such non-payment of taxes. Now, if defendant, exercising his own judgment, as was done in this case, determines not to file a return because he has no funds with which to pay the tax, and intending to file and pay later when he has the funds, as defendant testified, it seems to us that the failure to pay in such case, based as it is upon lack of funds, which condition would have exonerated him from any evil motive in a *failure-to-pay prosecution*, cannot be the basis for an inference of evil motive in supporting a willful failure to file prosecution in the absence of the strongest sort of affirmative proof of evil conduct. Such proof is completely absent in the present case.

We submit that the Court has attached substantially more weight to defendant's failure to pay his taxes than the principal charge of failing to file justifies in this case. We have shown that the Supreme Court in the *Spies* case, *supra*, would require an extremely rigid burden of proof in order to convict a person of failing to pay his taxes. Moreover, Congress has also indicated its resistance to com-

pel taxpayers to pay promptly by allowing taxpayers who are under financial hardships up to 30 months to pay *after* the date fixed for payment of a *deficiency* (I.R.C. Sec. 6161(b)):

This section of the Code prohibits such grace period "if the deficiency is due to negligence, to intentional disregard of rules and regulations, or to fraud with intent to evade tax".

Under the provisions of the above Code section, if a deficiency in tax were not determined for two or three years after the tax was due, the taxpayer, if he could prove undue hardship, as defendant here probably could, could be allowed an additional 30 months to pay. Under such circumstances, it appears that Congress has sanctioned a period of years within which to pay taxes.

If the deficiency in tax were due to negligence, intentional disregard of rules and regulations or fraud with intent to evade tax, defendant would not be entitled to the extended period.

Applying this Congressional test to the present case, we assume the Court's remarks regarding failure to pay taxes are not intended to apply in situations which meet the "financial hardship" test approved by Congress.

Although the only reason assigned to defendant's failure to file his returns was the lack of funds (nor did the government testify to any other reason), we assume the Court disregarded that explanation of defendant. If the Court did not disregard it, however, and there is some evidence that it did not disregard defendant's financial condition because the Court recognized that defendant was not "accumulating money and trying to hide it away" (App. 37), then the Court's reference to defendant's failure to pay his taxes cannot be used to impute or infer any evil motive.

If the Court did disregard the "financial hardship" explanation, then the Court's reference to defendant's failure

to pay his taxes must have been intended to impute to defendant either negligence, intentional disregard of Rules and Regulations, or fraud with intent to evade tax, — the same grounds recognized by Congress as being incompatible with the financial hardship theory.

But the Court has specifically rule out negligence in the first finding (App. 33).

In the same finding, the Court stated that the failure to file was, among other things, "intentional". In this same finding, the Court apparently means that it was intentional in that it was "voluntary" (which the Court specifically says) and does not mean to say that it was intentional and fraudulent (which the Court does not say).

If the Court meant to say of intentional that the failure to file was an intentional disregard of rules and regulations but without intent to defraud, then Congress has stated that a civil penalty is quite sufficient for such infractions.

Since the Court did not say that the failure to file though intentional was also fraudulent, which word would have been very simple to insert in the Court's first finding, if the Court so found, and since fraud can never be presumed, this Court must assume that the trial court did not find nor did it intend to find that the failure to file, or defendant's failure to pay his taxes, was fraudulen, with intent to evade taxes.

Defendant filed many requests for instructions setting forth his theory that a bad purpose or evil motive was an essential element in the Government's burden of proof, and had to be specifically proved. The Court time and again resisted such a finding and said you cannot "pin down the burden on the Government in this case and prove one particular element" (App. 36).

We submit that an evil motive is an essential element in the case, and in the absence of any finding of evil motive,

the Court should have granted defendant's request for a directed verdict. (*U.S. v. Murdock*, supra).

(c) — Murdock Case Misapplied by Trial Court

The trial Court specifically indicated that it was relying upon the *Murdock* case, in addition to others, in reaching its findings in this case (App. 33). Its opinion discloses in the wording thereof, such reliance.

We respectfully submit that the Court has misinterpreted the Supreme Court's language as set forth in said case.

The Supreme Court stated that the word willful "often denotes an act which is intentional, or knowing or voluntary as distinguished from accidental". "But", said the Court, "when used in a criminal statute it generally means an act done with a bad purpose. . . ." (*Murdock*, supra).

The defendant in the *Murdock* case had been indicted under a very similar statute to the one involved in this case.[2] The defendant's failure in the *Murdock* case was the alleged willful failure to supply information to revenue agents. The Supreme Court, in affirming the Circuit Court of Appeals reversal of defendant's conviction stated: "The respondent's refusal to answer was intentional and without legal justification, but the jury might nevertheless find that it was not prompted by bad faith or evil intent, which the statute makes an element of the offense". (*U.S. v. Murdock*, 290 U.S. 389). In the present case, the Court found that defendant's failure to file his returns was, among

[2] Section 1114(a) of the Revenue Act of 1926 declares: "Any person required under this Act to pay any tax, or required by law or regulations made under authority thereof to make a return, keep any records, or supply any information, for the purposes of the computation, assessment, or collection of any tax imposed by this Act, who *willfully* fails to pay such tax, make such return, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, be fined not more than $10,000 or imprisoned for not more than one year, or both, together with the costs of prosecution.

other things, "intentional" and without "legal excuse" and without "justifiable excuse", but it did not find that such failure was prompted by bad faith or evil motive, "which", the Supreme Court has said, "the statute makes an element of the offense".

Just four days before the Supreme Court decided the *Murdock* case on December 11, 1933, the Circuit Court of Appeals for the Fifth Circuit came to the same conclusion in a failure to file case and stated that where statutes denounce as criminal the willful doing of an act "a specific wrongful intent, that is, actual knowledge of the existence of obligation and a wrongful intent to evade it, is of the essence". (*Hargrove v. U.S.*, 67 F. 2d 820.)

A recent case in the United States Court of Appeals for the Ninth Circuit seems to us to clarify the meaning of the *Murdock* case. In *Block v. U.S.*, 9th Cir. (221 F. 2d 786, decided April 11, 1955), the Circuit Court of Appeals, upon its own motion, noticed error in the trial Court's interpretation and application of the *Murdock* case as expressed in the trial Court's instructions. The Circuit Court's opinion in part states as follows:

> "We think presumptive intent has no place in this case. . . . (Citing *Morissette v. U.S.*, 342 U.S. 246.)
>
> "The conclusion sought to be supplied by presumption in the *Morissette* case was one of intent to steal casings, based upon the mere fact the defendant took them. What was said in that case applies equally to the case at bar where under the above portion of the trial Court's charge the jury was told in effect that they could draw the conclusion that the appellant had intended to defeat or evade the payment of his tax from the mere fact that he filed an incorrect income tax return.
>
> (Erroneous Instruction on Willfulness)
>
> "The trial Court further instructed the jury as follows:

"'Willfully in the statute, which makes a willful attempt to evade taxes a crime, refers to the state of mind in which the act of evasion was done. *It includes several states of mind, any one of which may be the willfulness to make up the crime.*

"'*Willfulness includes doing an act with a bad purpose. It includes doing an act without a justifiable excuse. It includes doing an act without ground for believing that the act is lawful. It also includes doing an act with a careless disregard for whether or not one has the right so to act*'." (Italics supplied.)

"We think that the italicized portion of the above instruction is erroneous in this case.

"This portion of the Court's charge apparently was taken from the language of the Supreme Court in *U.S. v. Murdock*, 290 U.S. 389 at 394. The *Murdock* case was one in which defendant was indicted for refusal to give testimony and supply information as to deductions claimed in his tax returns for moneys paid to others in violation of Section 1114(a) of the Revenue Act of 1926 and Section 146(a) of the Revenue Act of 1928 which sections were identical. Those sections provided that:

"'Any person * * * required by law or regulations * * * to supply any information, for the purposes of the computation, assessment, or collection of any tax imposed by this Act, who willfully fails to * * * supply such information * * * shall * * * be guilty of a misdemeanor * * *'."

"When the Supreme Court there used the language which is embodied in the quoted portion of the trial Court's charge in this case, it was talking about how the word 'willfully' is variously defined under different statutes and circumstances. It is significant that in that case the Supreme Court, addressing itself to the particular case before it, said:

"'The respondent's refusal to answer was intentional and without legal justification, but the jury might nevertheless find that it was not prompted by bad faith or evil intent which the statute makes an element of the offense'."

"The *Murdock* case itself does not apply the definition of 'willfully' used by the trial Court in the instant Section 145(b) case."

CONCLUSION

We submit that at most the government's case is bottomed upon the suspicions harbored by the government's witnesses who investigated defendant's failure to file, and as a result of such suspicions, made oath that there was "probable cause" of guilt. The same agents testified to no more effect than that. Defendant, in his forthright testimony, completely meets and, we submit, overcomes the allegations and suspicions against him.

Francis Bacon has given suspicions their rightful place when he states in his *Essay of Suspicion*:

> "Suspicions amongst thoughts are like bats amongst birds, — they ever fly by twilight. Certainly they are to be repressed, or, at the least, well guarded. For they cloud the mind. . . . Certainly, the best means to clear the way in this same wood of suspicion, is frankly to communicate them with the party that he suspects. For thereby he shall be sure to know more of the truth of them than he did before. . . ."

Although the agents did communicate their suspicions to defendant, they cancelled the appointment wherein he could have given the agents "more of the truth" of their suspicions than they had before.

The facts in the present case and what they show, are not too unlike the cloud observed by Hamlet in his dialogue with Polonius:

> "Hamlet: Do you see that cloud that's almost in shape like a camel?
>
> Polonius: By the mass, and it's like a camel, indeed.
>
> Hamlet: Methinks it is like a weasel.
>
> Polonius: It is backed like a weasel.
>
> Hamlet: Or like a whale?
>
> Polonius: Very like a whale."

In other words, had the government's agents who investigated this matter and testified for the government herein concluded that the failure to file was without reasonable cause, but not due to willful neglect (I.R.C. Sec. 6651(a)), no one could say that that disposition of the case would have resulted in a travesty on justice, or a strained construction of the facts here involved. Such administrative determination would have had the result of imposing a 25% civil penalty in this case.

Similarly, had the agents concluded that the failure to file was due to "negligence or intentional disregard of rules and regulations" (Sec. 6653(a)) thereby invoking a 5% civil penalty, it cannot be said that that would be an unjust, or unreasonable disposition of the case.

We fail to see how the facts in this case make it one which is "more grievous than a case for civil penalty", thereby necessitating criminal sanctions, which the Supreme Court has indicated in the *Spies* case, supra, is one of the considerations which inferentially, at least, the administrative disposition should clearly be able to show.

No one, we submit, can point to any single fact in this case and say that such fact clearly and unmistakably tars defendant with criminal conduct thereby making the case one which is inappropriate for civil, or administrative, disposition.

We respectfully urge the court to well consider the following observation which none can doubt might have been possible in this case had dame fortune been more on defendant's side. If the defendant, either on his own initiative or through counsel who is familiar with Bureau procedure, had gone to the Internal Revenue Service at any time prior to November 14, 1955, the date of the first letter from the Service, for the purpose of arranging for the liquidation of his tax liability, it is not at all beyond the realm of possibility, indeed, it is quite possible inasmuch as there is statu-

tory authority for such disposition, that the Internal Revenue Service would have *then* computed the deficiency owed by him and arranged for him to have *as much as 30 months* within which to liquidate the liability (I.R.C. Sec. 6161(b)).

Such period of grace which conceivably could have been available to defendant, though under the present circumstances is now foreclosed to him in view of the fact that he borrowed the money and paid his taxes prior to the trial, should have the effect of completely nullifying the inferences drawn by the trial Court from defendant's failure to pay his taxes.

We respectfully submit that the "voluntary, purposeful, deliberate and intentional" failure to file is not sufficient to meet the test of willfulness laid down by the Supreme Court in the *Murdock* and *Spies* cases, supra, nor the *Hargrove* nor *Block* cases, supra, nor is the fact that such failure was without legal excuse or "without justifiable excuse". Nor, we respectfully submit, is there any evidence of concealment of obligation or tax liability. Indeed, the affirmative acts of defendant were specifically designed to reveal his tax liability, and having performed such acts (the causing of W-2's to be filed), it thereafter was beyond his power to conceal his tax liability.

As to the question of evil motive — which, the Supreme Court states, the statute makes an essential element of the offense (*Spies*, and *Murdock*, supra) — the record in this case will not support such a finding, if such a finding were in fact made by the Court. Quite the contrary of a finding of evil motive, the Court's statements made from time to time that defendant was not engaged in "any improper activity" and that defendant was not accumulating money and "trying to hide it away", and that this was not one of "the more serious cases", together with the Court's statement that you cannot "pin down the burden on the government in this case to prove one particular element", augurs against a finding of evil motive.

It unquestionably appears that the Court has found defendant guilty of willfulness, but not because of defendant's evil motive, inasmuch as the Court studiously avoided making such finding.

Even the Court manifests doubt or uncertainty in its opinion, or at least, it leaves unsettled exactly what elements the government's burden of proof encompassed, as well as uncertainty as to whether the government *actually* met its burden, or only *may have* met its burden. These uncertainties are apparent in the Court's statement that

> "I do not think you can pull individual phrases out of an opinion, as some of your requests for instructions do, and pin down the burden on the government in this case to prove one particular element or one particular way of proving willfulness and say that they must prove that when they *may have proved* other alternative avenues of reaching the same conclusion" (App. 36). (Italics supplied.)

We submit that the government in this case was required to prove "one particular element" in order to prove willfulness, namely, evil motive, and we do not see how any "alternative avenue of reaching the same conclusion" (of willfulness) can be substituted for what the Supreme Court has said is "an essential element of the offense" (*Murdock*, supra).

Certainly, neither the government's case, nor the record on the whole will reveal nor will it support a sharp, clear-cut, free-from-doubt finding of evil motive.

We respectfully submit that the Court should have granted defendant's request for a directed verdict.

Respectfully submitted,

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